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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

KLEENWELL BIOHAZARD WASTE AND GENERAL ECOLOGY CONSULTANTS, INCORPORATED,

Petitioner,

v.

SHARON NELSON, Chairman, et al.,

Respondents.

On Petition for a Writ of Certiorari From the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state may require a certificate for a solid waste collection company to provide a local waste collection service where the certification requirement provides no preference to in-state collection companies, affects interstate commerce only incidentally, and where the burden imposed on that commerce is not excessive.

2. Whether in a federal civil rights action a state administrative agency's fact findings are entitled to the same preclusive effect they would be given in the state courts, where the state agency acted in its judicial capacity to resolve those factual issues which were properly before it, and where the parties had an adequate opportunity to litigate those issues.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The facts regarding the operations of Kleenwell Biohazard Waste and General Ecology Consultants, Incorporated (Kleenwell), were presented in hearings before an administrative law judge in state administrative proceedings in May and June of 1992. The order which the Washington Utilities and Transportation Commission (WUTC) entered following those hearings is set forth in the appendix to Kleenwell's petition. Pet. App. 26(a)-68(a).

Kleenwell is a Washington corporation with all of its facilities located in that state. Kleenwell's two shareholders are

both Washington State residents. No out-of-state interests are involved in this case. Kleenwell operates a medical waste collection and disposal service in the greater King county area. Medical waste is collected from customers weekly and transported to a rented warehouse in Washington where it remains for up to 90 days until a load is hauled to California.

At one time, Kleenwell held a temporary certificate from the WUTC to operate as a solid waste collection company.[1] While operating under that temporary authority, Kleenwell used a disposal site in Ferndale, Washington.

After notice and hearing, Kleenwell's temporary authority was cancelled and its application for permanent authority denied. Kleenwell, nevertheless, continued to provide the same service in the same manner except that it began transporting the medical waste it collected to California.

The denial of Kleenwell's application was not based on a determination of whether there was a need for the proposed service. The application was denied because Kleenwell was found unfit to provide waste collection service for, among other reasons, knowingly violating health regulations regarding the storage of medical waste. Pet. App. 33(a).

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[1]Under Washington law, no company can lawfully operate as a solid waste collection company without first obtaining a certificate of public convenience and necessity from the WUTC. Wash. Rev. Code § 81.77.040; Pet. App. 69(a)-70(a).

At the time Kleenwell began transporting waste to California, the in-state disposal site was still accepting medical waste from Kleenwell. The only reason Kleenwell changed to the out-of-state disposal site was to try to avoid state regulation once its permanent application had been denied.

It is between two and three times as expensive to dispose of medical waste at the California facility than at Ferndale. There is nothing different in the handling and disposal of medical waste at the California facility that would justify the change in disposal sites.

The decision to dispose out-of-state was Kleenwell's alone. Kleenwell's customers were indifferent whether their medical waste was disposed in-state or out-of-state. No customers ever requested that their medical waste be disposed in California, and none objected to the disposal at Ferndale.

In January 1992, the WUTC imposed $6,000 in penalty assessments against Kleenwell for operating as a solid waste collection company in Washington State without a certificate to do so. Kleenwell asserted that the penalty assessment was invalid because the transportation in question was interstate in nature.

After the assessment of the penalty, the WUTC initiated an administrative proceeding by complaint to enforce the state certification requirements. In that proceeding, Kleenwell again

contended that it was not subject to the certification requirement because it was engaged in interstate commerce. The hearing was conducted in accordance with the state Administrative Procedure Act (APA) for adjudicative proceedings (Wash. Rev. Code § 34.05.410-.476) and the WUTC's rules of practice and procedure (Wash. Admin. Code Chapter 480-09). The hearing was presided over by an administrative law judge from the state Office of Administrative Hearings. Proper notice of the hearing was provided to Kleenwell. Motions to intervene were granted to five interested parties. All parties were represented by counsel. Kleenwell's counsel made an opening statement. Direct testimony under oath was presented and cross examined. Evidentiary objections were made and ruled upon. Exhibits were admitted into evidence. Opening briefs were filed by all parties and Kleenwell filed a reply brief. The administrative law judge issued an initial order. Kleenwell filed a petition for administrative review of the proposed order. The WUTC then entered its final order affirming the decision of the administrative law judge.

In its order, the WUTC determined that Kleenwell was operating as a "solid waste collection company" as defined by Wash. Rev. Code § 81.77.010(7) and was subject to the certification requirements of Wash. Rev. Code § 81.77.040. The WUTC considered Kleenwell's claim that it was immune

from state regulation under the Commerce Clause. Kleenwell never appealed the WUTC's decision in state court as provided by the state APA, but rather filed a complaint under 42 U.S.C. § 1983 in federal district court.

On September 10, 1993, the federal district court granted the commissioners of the WUTC their motion for summary judgment. Kleenwell appealed to the Ninth Circuit Court of Appeals which on February 9, 1995, affirmed the decision of the district court. *Kleenwell Biohazard Waste v. Nelson*, 48 F.3d 391 (9th Cir. 1995); Pet. App. 1(a).

REASONS WHY THE PETITION SHOULD BE DENIED

1. Petitioner Mischaracterizes the Purpose and Effect of the Washington Statute.

Kleenwell mischaracterizes the Washington statute as a restriction on the interstate transportation of waste. The Washington statute, neither in purpose nor in effect, impedes the interstate transportation of waste.

The statute directly regulates a local activity — solid waste collection in the state of Washington. Nothing in the statute dictates in any way where a certificated hauler transports waste for ultimate disposal. Nothing in this statute prevents the free flow of waste into or out of Washington State. Nothing in the statute favors in-state interests over out-of-state interests in

the certification process; companies based outside the state have the same rights to certification as those based inside the state.

Kleenwell's characterization of the Washington statutory framework as an obstruction to the interstate movement of waste is without basis in law or fact.

2. The Decision of the Court of Appeals Does Not Conflict With the Commerce Clause Decisions of This Court.

The Ninth Circuit Court of Appeals correctly decided that on the facts before it the Commerce Clause does not prevent the State of Washington from imposing its certification requirement on Kleenwell. There is no inconsistency between that decision and prior decisions of this Court.

A. The Decision of the Court of Appeals Does Not Conflict With *Buck v. Kuykendall*.

In attempting to find some inconsistency, Kleenwell relies on *Buck v. Kuykendall*, 267 U.S. 307 (1925) for the proposition that there is a per se rule against certification requirements such as Washington State's. As noted by the Court of Appeals, however, there are at least three cases of this Court upholding the constitutionality of state regulations requiring businesses engaged in interstate commerce to obtain state permits

prior to doing so.[2] *Kleenwell*, 48 F.3d at 396; Pet. App. 13(a)-15(a). *Buck v. Kuykendall* does not stand for the proposition that a carrier who crosses a state line is entitled to use state highways as a matter of right. *Bradley v. Public Util. Comm'n of Ohio*, 289 U.S. 92, 95 (1932).

Rather, the problem with the state action in *Buck* was summarized in the companion case of *Bush & Sons Co. v. Maloy*, 267 U.S. 317, 326 (1925):

> The state action in the Buck case was held to be unconstitutional . . . because the statute, as construed and applied, invaded a field reserved by the commerce clause for federal regulation.

Bush, 267 U.S. at 324-25. The field of solid waste collection, by contrast, is not a field reserved for federal regulation. The field of solid waste collection has been primarily reserved by Congress for local regulation:

> The Congress finds with respect to solid waste—
>
> . . . .
>
> (4) that . . . the collection and disposal of solid wastes should continue to be primarily the function of State, Regional and local agencies . . . .

42 U.S.C. § 6901(a)(4) (The Solid Waste Disposal Act).

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[2] *TV Pix, Inc. v. Taylor*, 396 U.S. 556 (1970) (per curium); *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961); *Bradley v. Public Util. Comm'n of Ohio*, 289 U.S. 92 (1933).

The infirmity in the statute in *Buck* was that its purpose was to prevent competition deemed undesirable, and the test employed was the adequacy of existing transportation facilities for conducting interstate commerce "a test peculiarly within the province of federal action." *Bradley v. Public Util. Comm'n of Ohio*, 289 U.S. 92, 95 (1932). Under the Washington statute, the WUTC is not concerned with the adequacy of transportation facilities for conducting interstate commerce. It is concerned with the adequacy of solid waste collection service—a test strictly related to local concerns.[3]

The vice in the statute in *Buck* was control of interstate commerce. This was demonstrated by the fact that Oregon had already issued a certificate of necessity for the interstate passenger route between Seattle and Portland on the finding that Oregon citizens would benefit from the service. Consequently, Washington's denial of a certificate affected not only its own citizens, but also those of Oregon, as well as citizens of other states who may have been traveling between the two cities. Here, the citizens of other states have no interest in the area of

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[3]The Court of Appeals noted that *Buck* turned upon the fact that the central purpose of the regulation was to regulate commerce. The primary purpose of Washington's regulation is to address a legitimate local concern with only incidental effects on interstate commerce. *Kleenwell*, 48 F.3d at 396; Pet. App. 1(a).

solid waste collection governed by the Washington statute.[4] *Buck* has no application here.

B. The Decision of the Court of Appeals Does Not Conflict With *C & A Carbone, Inc. v. Town of Clarkstown.*

There is likewise nothing inconsistent between the Court of Appeals' decision and the decision of this Court in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. ___, 114 S. Ct. 1677, 128 L. Ed. 2d. 399 (1994). Kleenwell states that *Carbone* is one of a series of decisions, the theme of which is that a state cannot restrict the flow of waste into or out of the state. Even accepting that characterization, there is nothing in the Washington statutes that prevents the free flow of waste across any state line or grants any preference to any in-state interests over out-of-state interests.

In *Carbone*, this Court found that the town of Clarkstown's flow control ordinance discriminated against interstate commerce in two ways. First, the Carbone processing facility received and processed waste from outside the town, including waste coming from out of state. Under the flow control ordinance, Carbone was required to send the

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[4]Kleenwell incorrectly argues that this case involves the same state law that was found invalid in *Buck v. Kuykendall*. *Buck* involved chapter 81.68 of the Revised Code of Washington relating to "auto transportation companies". *Kleenwell* involves chapter 81.77 (Wash. Rev. Code) relating to solid waste collection companies.

nonrecyclable portion of this out-of-state waste to the town's transfer station. This requirement drove up the cost for out-of-state interests to dispose of their solid waste.

Second, insofar as the ordinance applied to waste originating in Clarkstown, the ordinance prevented everyone except the single local operator from performing the initial processing step. Consequently, the court found that the ordinance deprived out-of-state businesses of access to a local market. *Carbone*, 114 S. Ct. at 1681.

The two reasons the Court found the town's ordinance to discriminate against interstate commerce are not present in the Washington statutory framework for solid waste collection as applied to *Kleenwell*.[5] Chapter 81.77 of the Revised Code of Washington (Wash. Rev. Code) does not drive up the costs for out-of-state interests, to dispose of solid waste or otherwise. No waste originating outside of the state of Washington is affected by the Washington statute.

Moreover, the Washington statute does not require that the collection service be performed by a local provider. Out-of-state businesses do provide collection services in the state of

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[5]The Clarkstown ordinance also generated revenue for the town since it was a financing measure. *Carbone*, 114 S. Ct. at 1684. Rates for certificated haulers are regulated to assure that they are fair, just, and reasonable, however, revenue generation for the state is not a feature of the Washington statute.

Washington. In the case of medical waste in particular, the WUTC granted statewide collection authority to American Waste Systems, a California corporation, which uses a California disposal site.[6] Pet. App. 65(a). Nor does the Washington statute impose any local processing requirement. When this Court focused on the processing and disposal service as the commerce in *Carbone*, the Court concluded that the flow control ordinance discriminated against out-of-state interests because it allowed only the favored local operator to process waste within the town limits:

> In this light, the flow control ordinance is just one more instance of local processing requirements that we long have held invalid. [Citations omitted.] . . . The essential vice in laws of this sort is that they bar the import of the processing service . . . Out-of-state [processors] . . . are deprived of access to local demand for their services.

Carbone, 114 S. Ct. at 1682.

Kleenwell is not importing a collection service from out of state. Kleenwell is a Washington corporation with all its facilities in the state. Thus, we are not here concerned with the importation of a service as an article of commerce as in *Carbone*. But more important, as noted above, out-of-state

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[6]Since American Waste System's certificate to collect medical waste covers the entire state, that authority overlaps every other service territory in the state. Thus, every service territory has at a minimum two carriers authorized to collect medical waste, at least one of which is an out-of-state business.

waste collection businesses are allowed to operate in the state of Washington whether they dispose waste within or outside the state.

3. The Decision of the Court of Appeals is Not in Conflict With the Decision of Another Circuit.

Kleenwell's claim that the decision below conflicts with the case of *Medigen v. Public Serv. Comm'n*, 985 F.2d 164 (4th Cir. 1993), is not correct. Kleenwell argues that the issue in this case is identical to that in *Medigen*, but that the results are opposite. Kleenwell, however, ignores the critical distinction that the facts in each case are different. The different results are fully explained by the different factual records before the two appellate courts.

This factual difference was noted by the *Kleenwell* court below:

> The Fourth Circuit appears to have reached a different conclusion in *Medigen v. Public Serv. Comm'n of West Virginia*, 985 F.2d 164 (4th Cir. 1993), where it ruled that West Virginia may not deny a certificate of convenience and necessity to medical waste transporters engaged in interstate commerce. We note, however, that the Fourth Circuit found "no basis in the record . . . for concluding that competition in this market has had or will have any destructive effects." *Id.* at 167. Here, in contrast, there is extensive evidence in the record that supports the WUTC's finding that a regulated market is necessary to protect the health and safety of Washington residents. Indeed, the Fourth Circuit acknowledged that "where competition has destructive effects, regulation may be justified." *Id.*

Kleenwell Biohazard Waste v. Nelson, 48 F.3d at 400-401, n.13; Pet. App. 24(a), n.13.

The Fourth Circuit Court in *Medigen* did not hold that the Commerce Clause was an absolute bar to a state's certification requirement to collect waste that eventually goes out-of-state. Both courts agree that whether a certification requirement contravenes the Commerce Clause depends on the facts of each case. The court in *Kleenwell* found the factual basis for upholding Washington's statutory framework. The court in *Medigen* found no basis in the record before it to conclude that competition in the West Virginia market had any destructive effects. Both the court in *Medigen* and the court in *Kleenwell* agreed that regulation could be justified where competition has destructive effects. *Medigen*, 985 F.2d at 167. *Kleenwell*, 48 F.3d at 399-400; Pet. App. 22(a)-23(a).

There is, likewise, no inconsistency between the *Kleenwell* and *Medigen* cases on the proper standard for reviewing certification requirements under the Commerce Clause. The Fourth Circuit in *Medigen* concluded, based on the factual record before it, that the West Virginia certification requirement was unconstitutional under the more deferential balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Consequently, the *Medigen*, court found it unnecessary to decide whether a stricter standard should be applied.

Medigen, 985 F.2d at 166. Because the *Medigen* court expressly declined to decide what level of scrutiny to apply, there is no inconsistency between the two circuits on that issue.[7]

4. The Court of Appeals' Decision May be Affirmed Based on the Transportation of Waste Between Two Points in the Same State, Which is an Intrastate Movement Subject to State Regulation.

Kleenwell's reliance on *Medigen* is misplaced for another reason. In that case, the Fourth Circuit specifically noted that Medigen did not engage in transportation of medical waste from one point in West Virginia to another point in West Virginia. *Medigen*, 985 F.2d at 165. Because Kleenwell's customers have no intent to transport their waste out of state, Kleenwell's transportation of waste between two points in the state of Washington is intrastate in nature and subject to state regulation on that basis. *Baltimore & Ohio Southwestern R.R. v. Settle*, 260 U.S. 166, 173-74 (1922). Although not relied on by the Court of Appeals, this ground was raised below and would be a separate basis for the WUTC to defend its judgment if certiorari

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[7]In reference to the appropriate level of scrutiny, Kleenwell is incorrect in its argument at page 25 of its petition that the WUTC's decision contained no finding that the certificate requirement was the only way to achieve a legitimate local purpose as would be required under the test in *Maine v. Taylor*, 477 U.S. 131 (1986). In the "Factual Background" contained in the memorandum portion of its order, the WUTC expressly found that there were no obvious alternatives to the certificate requirement to assure universal solid waste collection service at reasonable rates. Pet. App. 57(a)-60(a). There is no requirement under the state APA that factual findings be numbered.

were granted. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

5. The Decision of the Court of Appeals Has No Impact on a State's Authority to Ban the Interstate Transportation of Waste.

Kleenwell's exaggerated claim that the Court of Appeals' decision "will change the nature of interstate commerce nationwide" (Pet. at 17) by allowing states to control the flow of waste at state borders is legally and factually erroneous. Pet. at 15-16.

The question of whether states can stop the free flow of waste at the state borders has already been determined in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), where this Court held that a state cannot constitutionally block the free flow of waste at the state border based solely on its origin. Nothing in the decision below conflicts with that holding.

As the Court of Appeals found, there is nothing in the Washington statutory scheme that blocks the flow of waste across the state's borders. Certificated carriers may, and do, transport waste out of state for disposal with no interference from the state of Washington. In its administrative order, the WUTC stated that a certificated carrier does not need to request WUTC approval to transport waste across state lines. Pet. App. 40(a)-41(a). Moreover, because the Washington statutory scheme is directed at only the local activity of waste collection, there is no

requirement for a certificate of convenience and necessity to import waste into Washington State or to export waste in long haul movements from a disposal site, transfer station, or other point of accumulation. Pet. App. 41(a).

6. The Court of Appeals Correctly Applied *University of Tennessee v. Elliott*.

When a state agency acting in its judicial capacity resolves factual issues which are properly before it and which the parties have had an adequate opportunity to litigate, federal courts in 42 U.S.C. § 1983 cases give the agency's factual findings the same preclusive effect they would be entitled to in the state's courts. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). The Court of Appeals correctly concluded that the administrative hearing before the WUTC met all the requirements of *Elliott*. *Kleenwell*, 48 F.3d at 394-95; Pet. App. 10(a)-12(a).

Kleenwell's claim of being denied an opportunity for a fair determination of the facts is disingenuous. First, the administrative proceedings were conducted by an administrative law judge from the state Office of Administrative Hearings, an independent state agency charged with conducting impartial administrative hearings. Wash. Rev. Code § 34.12.010. The WUTC affirmed the initial order of the administrative law judge.

Second, the claim that the fact finding was biased is quite remarkable since all the factual findings regarding Kleenwell's operations were based exclusively on Kleenwell's own testimony and exhibits. Kleenwell made its factual presentation before the WUTC based on a theory of law that it believed exempted it from state regulation. Kleenwell now seeks a second opportunity to make a different factual presentation based on the same theory of law. It is difficult to conceive of a clearer case for the application of collateral estoppel.

Kleenwell's complaint that it should get a second attempt to litigate whether medical waste is harmful is irrelevant. The Court of Appeals' decision addressed the Washington statutory scheme for solid waste collection, whether that waste is medical waste or some other type of waste. In any event, Kleenwell had a full and adequate opportunity to present before the WUTC any evidence supporting its theory of the case.

Kleenwell's sensational claims of the WUTC's abuse of procedure are baseless. In determining whether *Elliott* applied to the facts of this case, two levels of the federal judiciary have now reviewed the WUTC's procedures as applied to Kleenwell and have not found those procedures biased or otherwise deficient. And, of course, those courts have independently reviewed the constitutional question without giving any deference to the WUTC.

Kleenwell's claim that it could not file its civil rights action in federal court until the WUTC had issued its decision misstates the law. The WUTC's staff had earlier issued Kleenwell a warning letter to cease collecting waste in this state until it received a certificate authorizing it to do so. The WUTC had also issued a penalty assessment against Kleenwell for operating as a solid waste collection company without a certificate. A reasonable threat of a prosecution gives rise to a ripe controversy. *Steffel v. Thompson*, 415 U.S. 452, 458-59 (1974). In the *Medigen* case relied on by Kleenwell, the federal plaintiff did file its complaint in federal district court upon the threat of prosecution. *Medigen*, 958 F.2d at 165. Kleenwell could have done likewise and was not "trapped" from filing its suit.

Finally, Kleenwell's reliance on *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936), is misplaced. That case involved the judicial review of the factual findings of an administrative agency, rather than the relitigation of those factual findings. Kleenwell's argument confuses judicial review of findings of fact, which it did not seek in the state courts, with relitigation of factual matters which it seeks but to which it is not entitled under *Elliott*. Kleenwell takes the contradictory approach of not seeking judicial review, and then citing cases on

the scope of judicial review to support the entirely different proposition that it may relitigate those facts.

CONCLUSION

For the foregoing reasons, the petitioners' petition for a writ of certiorari should be denied.

Respectfully submitted,

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